

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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DEMOND DONERSON,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 15-2607-JDT-dkv
	)	
DRENEL FOX, ET AL.,	)	
	)	
Defendants.	)	

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ORDER DISMISSING CLAIMS,  
CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH  
AND NOTIFYING PLAINTIFF OF APPELLATE FILING FEE  
AND NOTIFYING PLAINTIFF OF RESTRICTIONS UNDER 28 U.S.C. § 1915(g)

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On September 14, 2015, Plaintiff Demond Donerson (“Donerson”), who is currently an pre-trial detainee at the Shelby County Criminal Justice Center (“Jail”) in Memphis, Tennessee, filed a *pro se* complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1.) On September 15, 2015, Donerson filed a motion to proceed *in forma pauperis*. (ECF No. 3.) In an order issued September 17, 2015, the Court granted leave to proceed *in forma pauperis* and assessed the civil filing fee pursuant to the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. §§ 1915(a)-(b). (ECF No. 4) On March 7, 2016, Donerson filed an amended complaint intended to supplement, rather than supersede, the original complaint. (ECF No. 5.) The Clerk shall record the defendants as Officer Drenel Fox, the City of Memphis,<sup>1</sup> and Officer M. Fair. Defendants Fox and Fair are sued in their individual and official capacity.

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<sup>1</sup>Allegations against the City of Memphis Robbery Division are construed as allegations against the City of Memphis, who is already a named party in this complaint. The Clerk is

## I. The Complaint

Donerson alleges that on November 6, 2011, police, acting on “false accusations and rumors,” went to Donerson’s home and proceeded to conduct a search and seizure of the premises. (Amended Compl. at 2, ECF No. 5.) Donerson alleges that the officers were acting upon orders from Defendant Fox. (*Id.*) When the officers came to his home, Donerson was seized, his home was searched, and he was placed in a police cruiser where he was interrogated about crimes that “allegedly occurred on November 5, 2011.” (*Id.*) Donerson denied his involvement and professed his innocence. (*Id.*)

Donerson was taken to Defendant Fox’s office where he was not advised of his rights, but rather was asked about the aforementioned date and whether he had an alibi for that date. (*Id.* at 3.) Donerson was then presented with an “Advice of Rights Form/ Waiver,” which he signed. (*Id.*) Donerson alleges that Defendant Fox entered the time on the form to give the appearance of a voluntary waiver; however, Donerson contends that he did not sign the form, “knowingly, intelligently, or voluntarily,” which caused his exculpatory statement to be “destroyed by Fox preceding his release from custody.” (*Id.*)

On November 7, 2011, Donerson called Defendant Fox to inquire about any new developments in the case. (*Id.*) At that time, Defendant Fox informed Donerson that a warrant had been issued for his arrest resulting in Donerson informing Fox of his location leading to his subsequent arrest. Donerson alleges that he was leg-cuffed and interrogated without receiving his Miranda rights. (*Id.* at 3-4.) Even though Donerson provided an alibi and exculpatory facts, Donerson contends that Defendant Fox produced a statement implicating Donerson and then coerced Donerson into signing it by threatening to reveal a murder plot by Donerson. (*Id.* at 4.)

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DIRECTED to remove the City of Memphis Robbery Division as a defendant.

Donerson continues by alleging that Defendant Fox signed, initialed and fabricated the time on Donerson's Advice of Rights/Waiver form. (*Id.*) Donerson alleges that Defendants Fox and Fair falsely signed for Donerson on the "fabricated four page statement" resulting in Donerson being denied counsel and causing Donerson to be placed in detention on November 8, 2011. (*Id.* at 5.) Donerson alleges that on that same date, Defendant Fox appeared before the judicial commissioner and presented falsehoods to court which were "instrumental in causing warrant to issue." (*Id.* at 8.) Additionally, on November 15, 2011 Donerson's saliva samples were procured without consent violating his right to due process. (*Id.*)

On January 25, 2012, Donerson's preliminary hearing was held. (*Id.* at 7.) At the hearing, the "victim" was unable to identify Donerson; however, Defendant Fox testified that Donerson confessed to the crimes after waiving his rights. (*Id.*) Donerson alleges that Fox's testimony was made with, "utter and reckless disregard for truth." (*Id.*)

Donerson provides five counts against defendants. In count one, Donerson alleges that Defendants Fox and Fair violated his Constitutional rights causing his false arrest, imprisonment, malicious prosecution, and conspiracy to "perpetrate [sic] these abridements [sic]." (*Id.* at 5.) In count two, Donerson alleges that Defendants Fox and Fair, acting under the color of law as Memphis Police Officers, acted with "racial and class based discriminatory animus" causing forty-five months of incarcerations. (*Id.*) Donerson alleges in count three that Defendant Fox placed him a false light and presented deliberate falsehoods which were sold to a media causing an invasion of privacy. (*Id.*) Count four's allegations are predicated upon allegations that Defendant Fox fabricated the confession and forged his signature resulting in the count five allegations of emotional distress. (*Id.* at 6.) Lastly, Donerson alleges that the underlying acts by

defendants also show conspiracy motivated by their “malevolent agendas to injure, oppress, and intimidate Plaintiff.” (*Id.* at 10.)

Donerson seeks compensatory, punitive, and treble damages as well as orders of the court regarding Defendants actions, their need to train to prevent future incidents, as well as corrective actions by the district attorney. (*Id.* at 10-11.)

By way of background, Donerson was arrested on November 8, 2011. On June 28, 2012, a grand jury in Shelby County, Tennessee returned a three count indictment charging him with especially aggravated robbery, aggravated burglary, and adult abuse/neglect. *See* <http://jssi.shelbycountyttn.gov> (Indictment # 12 03325). A second, five-count indictment was returned on November 24, 2015, charging Donerson with criminal attempt at first degree murder, aggravated robbery, especially aggravated burglary, aggravated assault, and adult abuse/neglect/exploitation. *Id.* (Indictment # 15 05992). The charges remain pending.

## II. Analysis

### A. Screening and Standard

The Court is required to screen prisoner complaints and to dismiss any complaint, or any portion thereof, if the complaint—

- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
- (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A(b); see also 28 U.S.C. § 1915(e)(2)(B).

In assessing whether the complaint in this case states a claim on which relief may be granted, the court applies standards under Federal Rule of Civil Procedure 12(b)(6), as stated in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 555-57 (2007). *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010). “Accepting all well-pleaded allegations in the complaint as true, the Court ‘consider[s] the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief.’” *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 681) (alteration in original). “[P]leadings that . . . are no more than conclusions . . . are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679; *see also Twombly*, 550 U.S. at 555 n.3 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”).

“A complaint can be frivolous either factually or legally. Any complaint that is legally frivolous would *ipso facto* fail to state a claim upon which relief can be granted.” *Hill*, 630 F.3d at 470 (citing *Neitzke v. Williams*, 490 U.S. 319, 325, 328-29 (1989)).

Whether a complaint is factually frivolous under §§ 1915A(b)(1) and 1915(e)(2)(B)(i) is a separate issue from whether it fails to state a claim for relief. Statutes allowing a complaint to be dismissed as frivolous give “judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” *Neitzke*, 490 U.S. at 327, 109 S. Ct. 1827 (interpreting 28 U.S.C. § 1915). Unlike a dismissal for failure to state a claim, where a judge must accept all factual allegations as true, *Iqbal*, 129 S. Ct. at 1949-50, a judge does not have to accept “fantastic or delusional” factual allegations as true in prisoner complaints that are reviewed for frivolousness. *Neitzke*, 490 U.S. at 327-28, 109 S. Ct. 1827.

*Id.* at 471.

“*Pro se* complaints are to be held ‘to less stringent standards than formal pleadings drafted by lawyers,’ and should therefore be liberally construed.” *Williams*, 631 F.3d at 383

(quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004)). *Pro se* litigants and prisoners are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989); *see also Brown v. Matauszak*, No. 09-2259, 2011 WL 285251, at \*5 (6th Cir. Jan. 31, 2011) (affirming dismissal of *pro se* complaint for failure to comply with “unique pleading requirements” and stating “a court cannot ‘create a claim which [a plaintiff] has not spelled out in his pleading’”) (quoting *Clark v. Nat’l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975)) (alteration in original); *Payne v. Sec’y of Treas.*, 73 F. App’x 836, 837 (6th Cir. 2003) (affirming *sua sponte* dismissal of complaint pursuant to Fed. R. Civ. P. 8(a)(2) and stating, “[n]either this court nor the district court is required to create Payne’s claim for her”); *cf. Pliler v. Ford*, 542 U.S. 225, 231 (2004) (“District judges have no obligation to act as counsel or paralegal to *pro se* litigants.”); *Young Bok Song v. Gipson*, 423 F. App’x 506, 510 (6th Cir. 2011) (“[W]e decline to affirmatively require courts to ferret out the strongest cause of action on behalf of *pro se* litigants. Not only would that duty be overly burdensome, it would transform the courts from neutral arbiters of disputes into advocates for a particular party. While courts are properly charged with protecting the rights of all who come before it, that responsibility does not encompass advising litigants as to what legal theories they should pursue.”).

B. § 1983 Claim

Donerson filed his complaint and amended complaint pursuant to actions under 42 U.S.C.

§ 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that

in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) a deprivation of rights secured by the “Constitution and laws” of the United States (2) committed by a defendant acting under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

1. *Claims against the City of Memphis*

Claims against Defendants Fox and Fair in their official capacity are properly asserted against the City of Memphis, who is a named party in the complaint. The complaint does not assert a valid claim against the City of Memphis. When a § 1983 claim is made against a municipality, the court must analyze two distinct issues: (1) whether the plaintiff’s harm was caused by a constitutional violation; and (2) if so, whether the municipality is responsible for that violation. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120 (1992). Even if it were assumed that the complaint alleged a violation of Donerson’s constitutional rights, the second issue would be dispositive of Donerson’s claims against the City of Memphis.

A local government “cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 691 (1978); *see also Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994); *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994). A municipality cannot be held responsible for a constitutional deprivation unless there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *Monell*, 436 U.S. at 691-92; *Deaton v. Montgomery Cnty., Ohio*, 989 F.2d 885, 889 (6th Cir.

1993). To demonstrate municipal liability, a plaintiff “must (1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that his particular injury was incurred due to execution of that policy.” *Alkire v. Irving*, 330 F.3d 802, 815 (6th Cir. 2003) (citing *Garner v. Memphis Police Dep’t*, 8 F.3d 358, 364 (6th Cir. 1993)). “Where a government ‘custom has not received formal approval through the body’s official decisionmaking channels,’ such a custom may still be the subject of a § 1983 suit.” *Alkire*, 330 F.3d at 815 (quoting *Monell*, 436 U.S. at 690-91). The policy or custom “must be ‘the moving force of the constitutional violation’ in order to establish the liability of a government body under § 1983.” *Searcy*, 38 F.3d at 286 (quoting *Polk Cnty. v. Dodson*, 454 U.S. 312, 326 (1981) (citation omitted)). “[T]he touchstone of ‘official policy’ is designed ‘to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.’” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 138 (1988) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479-80 (1986)).

Although civil rights plaintiffs are not required to plead the facts demonstrating municipal liability with particularity, *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993), the complaint must be sufficient to put the municipality on notice of the plaintiff’s theory of liability, *see, e.g., Fowler v. Campbell*, Civil Action No. 3:06CV-P610-H, 2007 WL 1035007, at \*2 (W.D. Ky. Mar. 30, 2007); *Yeackering v. Ankrom*, No. 4:05-CV-00018-M, 2005 WL 1877964, at \*2 (W.D. Ky. Aug. 5, 2005); *Oliver v. City of Memphis*, No. 04-2074-B, 2004 WL 3316242, at \*4 (W.D. Tenn. Dec. 2, 2004); *cf. Raub v. Corr. Med. Servs., Inc.*, No. 06-13942, 2008 WL 160611, at \*2 (E.D. Mich. Jan. 15, 2008) (denying motion to dismiss where complaint contained conclusory allegations of a custom or practice); *Cleary v. Cnty. of Macomb*, No. 06-15505, 2007 WL 2669102, at \*20 (E.D. Mich.



Sept. 6, 2007) (same); *Morningstar v. City of Detroit*, No. 06-11073, 2007 WL 2669156, at \*8 (E.D. Mich. Sept. 6, 2007) (same); *Chidester v. City of Memphis*, No. 02-2556 MA/A, 2006 WL 1421099, at \*3 (W.D. Tenn. June 15, 2005). The complaint does not allege that Donerson suffered any injury arising from an unconstitutional policy or custom of the City of Memphis.

## 2. *Statute of Limitations*

Donerson's claims against the Defendants for false arrest/arrest without probable cause and false imprisonment are time barred. The statute of limitations for a § 1983 action is the "state statute of limitations applicable to personal injury actions under the law of the state in which the § 1983 claim arises." *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007); *see also Wilson v. Garcia*, 471 U.S. 261, 275-76 (1985). The limitations period for § 1983 actions arising in Tennessee is the one-year limitations provision found in Tenn. Code Ann. § 28-3-104(a). *Roberson v. Tennessee*, 399 F.3d 792, 794 (6th Cir. 2005); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 547 (6th Cir. 2000); *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). The Supreme Court's decision in *Wallace v. Kato*, 549 U.S. 384, 391-92, 397 (2007), makes clear that a claim for false arrest or false imprisonment accrues at the time of arrest or, at the latest, when detention without legal process ends.<sup>2</sup>

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<sup>2</sup> The Supreme Court explained:

Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held pursuant to such process-when, for example, he is bound over by a magistrate or arraigned on charges. . . . Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by wrongful institution of legal process. . . . "If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself." . . . Thus, petitioner's contention that his false imprisonment ended upon his release from custody, after the State dropped the charges against him, must be rejected. It

The Sixth Circuit has held that a Fourth Amendment claim based on an allegedly unlawful arrest accrues at the time of arrest. *Fox v. DeSoto*, 489 F.3d 227, 233, 235 (6th Cir. 2007). Donerson was arrested on November 8, 2011, and indicted on June 28, 2012. He filed the complaint more than one year later, on September 14, 2015; therefore, the false arrest and false imprisonment claims are time barred.

### 3. *Malicious Prosecution*

The complaint also does not state a valid malicious prosecution claim against any Defendant. The Sixth Circuit “recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment,” which “encompasses wrongful investigation, prosecution, conviction, and incarceration.” *Barnes v. Wright*, 449 F.3d 709, 715-16 (6th Cir. 2006) (internal quotation marks omitted). The “tort of malicious prosecution” is “entirely distinct” from that of false arrest, as the malicious-prosecution tort “remedies detention accompanied not by absence of legal process, but by wrongful institution of legal process.” *Wallace*, 549 U.S. at 390 (2007) (internal quotation marks omitted).

To succeed on a malicious-prosecution claim under § 1983 when the claim is premised on a violation of the Fourth Amendment, a plaintiff must prove the following: First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant “ma[d]e, influence[d], or participate[d] in the decision to prosecute.” *Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007); *see also McKinley v. City of Mansfield*, 404 F. 3d 418, 444 (6th Cir. 2005); *Darrah v. City of Oak Park*, 255 F.3d 301, 312 (6th Cir. 2001); *Skousen v. Brighton High Sch.*, 305 F.3d 520, 529 (6th Cir. 2002). Second, because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution, *Fox*, 489 F.3d

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ended much earlier, when legal process was instituted against him, and the statute [of limitations] would have begun to run from that date.

*Id.* at 389-90 (emphasis in original; footnote and citations omitted); *see also id.* at 390 n.3 (“This is not to say, of course, that petitioner could not have filed suit immediately upon his false arrest. While the statute of limitations did not begin to run until petitioner became detained pursuant to legal process, he was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time.”).

at 237; *Voyticky*, 412 F.3d at 675. Third, the plaintiff must show that, “as a consequence of a legal proceeding,” the plaintiff suffered a “deprivation of liberty,” as understood in our Fourth Amendment jurisprudence, apart from the initial seizure. *Johnson v. Knorr*, 477 F.3d 75, 81 (3d Cir. 2007); see *Gregory v. City of Louisville*, 444 F.3d 725, 748-50 (6th Cir. 2006) (discussing the scope of “Fourth Amendment protections . . . beyond an initial seizure,” including “continued detention without probable cause”); cf. *Heck v. Humphrey*, 512 U.S. 477, 484, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994) (“[U]nlike the related cause of action for false arrest or imprisonment, [an action for malicious prosecution] permits damages for confinement imposed pursuant to legal process.”). Fourth, the criminal proceeding must have been resolved in the plaintiff’s favor. *Heck*, 512 U.S. at 484, 114 S. Ct. 2364 (“One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.”).

*Sykes v. Anderson*, 625 F. 3d 294, 308-09 (6th Cir. 2010) (footnote omitted).

The fact that Donerson was ultimately indicted by the grand jury shows the existence of probable cause for the charges. “[T]he finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.” *Higgason v. Stephens*, 288 F. 3d 868, 877 (6th Cir. 2002) (quoting *Ex parte United States*, 287 U.S. 241, 250, 53 S. Ct. 129, 77 L. Ed. 283 (1932)). In light of the grand jury indictments, any malicious prosecution claim fails because Donerson cannot show the absence of probable cause.

#### 4. *Emotional Distress*

In Tennessee “[i]ntentional infliction of emotional distress and outrageous conduct are not two separate torts, but are simply different names for the same cause of action.” *Meeks v. Gasaway*, No. M2012-02083-COA-R3-CV, 2013 WL 6908942, at \*2 n.4 (Tenn. Ct. App. Dec. 30, 2013). The Tennessee Supreme Court has described the requirements for recovery on a claim of outrageous conduct:

In *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 479, 398 S.W.2d 270, 274 (1966), this Court recognized the tort of outrageous conduct, quoting with approval § 46(1) of the Restatement (Second) of Torts, which provides as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Accordingly, under Tennessee law, there are three essential elements to a cause of action: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury. *Id.*; see also *Johnson v. Woman's Hospital*, 527 S.W.2d 133, 144 (Tenn. App. 1975).

We emphasized in *Medlin* that liability for mental distress damages clearly “does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities.” *Id.*, 398 S.W.2d at 274 (internal quotations omitted). Although no perfect legal standard exists for determining whether particular conduct is so intolerable as to be tortious, this Court has adopted and applied the high threshold standard described in the Restatement (Second) of Torts as follows:

The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous.’

*Medlin*, 217 Tenn. at 479, 398 S.W.2d at 274. As this Court stressed in *Medlin*, it is the court's duty in the first instance to apply that standard and determine “whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery....” *Id.*, 217 Tenn. at 479, 398 S.W.2d at 274.

*Bain v. Wells*, 936 S.W.2d 618, 622-23 (Tenn. 1997) (footnote and additional citations omitted).

Donerson's complaint fails to allege a valid claim against Defendants Fox or Fair for the tort of outrageous conduct. As a preliminary matter, the complaint does not adequately allege the third element of the claim, that either defendants' conduct inflicted serious mental injury.

## 5. Conspiracy

Donerson alleges that the Defendants' actions were part of a general conspiracy against him; however, these claims do not adequately allege a civil conspiracy. As the Sixth Circuit Court of Appeals has explained:

In *Spadafore v. Gardner*, 330 F.3d 849 (6th Cir. 2003), we stated the standard governing a § 1983 conspiracy claim:

A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

330 F.3d at 854 (quoting *Hooks v. Hooks*, 771 F.2d 935, 943–44 (6th Cir. 1985)). Although circumstantial evidence may prove a conspiracy, “[i]t is well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983.” *Id.* (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987)); accord *Farhat v. Jopke*, 370 F.3d 580, 599 (6th Cir. 2004). That pleading standard is “relatively strict.” *Fieger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008).

*Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 563 (6th Cir. 2011). An assertion, unaccompanied by supporting facts, that parties conspired with each other is a legal conclusion that a court need not accept as true. *Id.* at 563-64 (collecting cases). Allegations of “a plan or agreement to violate [the plaintiff’s] constitutional rights” is required. *Id.* at 564. Donerson’s allegations that Defendants conspired with each other are entirely devoid of supporting facts.

### III. Standard for Leave to Amend

The Sixth Circuit has held that a district court may allow a prisoner to amend his complaint to avoid a *sua sponte* dismissal under the PLRA. *LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013); see also *Brown v. R.I.*, No. 12-1403, 2013 WL 646489, at \*1 (1st Cir. Feb. 22, 2013) (per curiam) (“Ordinarily, before dismissal for failure to state a claim is ordered, some

form of notice and an opportunity to cure the deficiencies in the complaint must be afforded.”). Leave to amend is not required where a deficiency cannot be cured. *Brown*, 2013 WL 646489, at \*1; *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001) (“This does not mean, of course, that every *sua sponte* dismissal entered without prior notice to the plaintiff automatically must be reversed. If it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile, then a *sua sponte* dismissal may stand.”); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002) (“*in forma pauperis* plaintiffs who file complaints subject to dismissal under Rule 12(b)(6) should receive leave to amend unless amendment would be inequitable or futile”); *Curley v. Perry*, 246 F.3d 1278, 1284 (10th Cir. 2001) (“We agree with the majority view that *sua sponte* dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right of access to the courts.”).

#### IV. Appeal Issues

Pursuant to 28 U.S.C. §1915(a)(3), the Court must also consider whether an appeal by Plaintiff in this case would be taken in good faith. The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The test for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous. *Id.* It would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the Defendants, but has sufficient merit to support an appeal *in forma pauperis*. See *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

## V. Conclusion

The Court DISMISSES Donerson's complaint for failure to state a claim on which relief can be granted, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b(1)). Leave to amend is DENIED because the deficiencies in Donerson's complaint cannot be cured.

The Court must also consider whether Donerson should be allowed to appeal this decision *in forma pauperis*, should he seek to do so. A non-prisoner desiring to proceed on appeal *in forma pauperis* must obtain pauper status under Federal Rule of Appellate Procedure 24(a). *See Callihan v. Schneider*, 178 F.3d 800, 803-04 (6th Cir. 1999). However, Rule 24(a)(3) provides that if a party was permitted to proceed *in forma pauperis* in the district court, he may also proceed on appeal *in forma pauperis* without further authorization unless the district court "certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis." If the district court denies pauper status, the party may file a motion to proceed *in forma pauperis* in the Court of Appeals. Fed. R. App. P. 24(a)(4)-(5).

The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The test for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous. *Id.* It would be inconsistent for a district court to determine that a complaint should be dismissed prior to service on the Defendants, but has sufficient merit to support an appeal *in forma pauperis*. *See Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983). The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

It is CERTIFIED, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter by Donerson would not be taken in good faith. Leave to appeal *in forma pauperis*

is, therefore, DENIED. Accordingly, if Donerson files a notice of appeal, he must also pay the full \$505 appellate filing fee or file a motion for leave to appeal *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals.

For analysis under 28 U.S.C. § 1915(g) of future filings, if any, by Donerson, this is the third dismissal of one of his cases as frivolous or for failure to state a claim.<sup>3</sup> This “strike” shall take effect when judgment is entered. *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015).

Section 1915(g) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Consequently, Donerson is warned that he is barred from filing any further actions *in forma pauperis* while he is a prisoner within the meaning of 28 U.S.C. § 1915(h) unless he is in imminent danger of serious physical injury. Any civil action filed by Harper after the date of the judgment in this case must be accompanied by either the \$400 civil filing fee or allegations sufficient to show that, at the time of filing the action, he is in imminent danger of serious physical injury. If Donerson submits any complaint that does not allege he is under imminent danger of serious physical injury or is not accompanied by the filing fee, the complaint will be filed, but Donerson will be required to remit the full filing fee. If he fails to do so, the case will be dismissed, and the filing fee will be assessed from his inmate trust account without regard to the installment payment procedures of 28 U.S.C. §§ 1915(a)-(b).<sup>4</sup>

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<sup>3</sup> See *Donerson v. Shelby County Government*, No. 15-cv-2362-STA-dkv (W.D. Tenn. August 5, 2015) (dismissed for failure to state a claim), and *Donerson v. Shelby County, et al.*, No. 14-2915-JDT-dkv (W.D. Tenn. Jan. 6, 2015) (dismissed for failure to state a claim).

<sup>4</sup> Donerson is further cautioned that, if he attempts to evade the § 1915(g) restriction by



The Clerk is directed to prepare a judgment.

IT IS SO ORDERED.

**s/James D. Todd**  
JAMES D. TODD  
UNITED STATES DISTRICT JUDGE

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filing actions in other jurisdictions that are then transferred or removed to this district, the Court may impose a monetary sanction in the full amount of the civil filing fee.